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Supreme Court, U.S.
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No. 08-1455

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD S. BAUMHAMMERS,
Petitioner,
V.
COMMONWEALTH OF PENNSYLVANIA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO
THE SUPREME COURT OF PENNSYLVANIA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the petitioner's due process and Eighth Amendment rights were violated by the lack of an instruction, pursuant to *Simmons v. South Carolina*, informing the jury that he would not be eligible for parole if he were sentenced to a term of life imprisonment, given that a) the petitioner never requested such an instruction, and b) the petitioner's future dangerousness was not placed at issue during the entirety of the proceeding?

II. Whether the petitioner's due process rights were violated by the victim impact statements presented during the penalty phase of his trial, even though a) none of the statements were ever objected to by the

petitioner and b) the statements were merely personal accounts by witnesses describing the impact that the murders had on the surviving family members?

III. Whether the Eighth Amendment is violated by the imposition of the death penalty on individuals such as the petitioner, who has been diagnosed with delusional disorders?

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JURISDICTION

The petitioner has invoked jurisdiction under 28 U.S.C.A. §1257(a).

STATEMENT OF THE CASE

A. Procedural History

The Commonwealth of Pennsylvania filed a Criminal Information against the petitioner, Richard S. Baumhammers, at No. CC 200014714, charging him with four (4) counts of criminal homicide, in violation of 18 Pa. C.S. §2501, for the April 28, 2000 shooting deaths of Anita Gordon, Anil Thakur, Thoa Quoc Phem and Ji-Ye Sun (Docket Entry No. 31).[1] At Criminal Information No. CC 200014713, the

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[1] The docket entries refer to the docket of the Allegheny County Court of Common Pleas.

petitioner was charged with one (1) additional count of criminal homicide for the April 28, 2000 shooting death of Garry Lee, as well as one (1) count of simple assault, in violation of 18 Pa. C.S. §2701, for pointing his gun at George Thomas II (Part III, Docket Entry No. 3). At Criminal Information No. CC 200014712, the petitioner was charged with one (1) count of aggravated assault, in violation of 18 Pa. C.S. §2702 (a)(1); and one count of attempted homicide, in violation of 18 Pa. C.S. §901, for shooting Sandip Patel (Part II, Docket Entry No. 3). In addition, at that same Criminal Information, the petitioner was charged with eight (8) counts of ethnic intimidation, in violation of 18 Pa. C.S. §2710; two (2) counts of institutional vandalism, in violation of 18 Pa. C.S. §3307; two (2) counts of criminal mischief, in violation of 18 Pa. C.S. §3304; three (3) counts of

arson, in violation of 18 Pa. C.S. §3301; one (1) count of carrying a firearm without a license, in violation of the Uniform Firearms Act, 18 Pa. C.S. §6106; and one (1) count of recklessly endangering another person, in violation of 18 Pa. C.S. §2705 (Part II, Docket Entry No. 3).

At the time of the filing of the Criminal Informations, the Commonwealth also provided notice of its intention to seek the death penalty and notice of the aggravating circumstances (*see* Docket Entry No. 31 *and* Part III, Docket Entry No. 2).

On April 27, 2001, the petitioner proceeded to a trial by jury before the Honorable Jeffrey A. Manning of the Court of Common Pleas of Allegheny County (*see* Docket Entries Nos. 102-05). At the conclusion of trial, on May 9, 2001, the petitioner was found guilty of five counts of murder in the first

degree for the deaths of Anita Gordon, Anil Thakur, Thoa Quoc Phem, Ji-Ye Sun and Garry Lee (TT, 2709; *see also* Docket Entry No. 82 *and* Part II, Docket Entry No. 3).[2] The jury also found the petitioner guilty of all other counts (TT, 2709-11; *see also* Part II, Docket Entry No. 4 *and* Part III, Docket Entry No. 3).

The following day, May 10, 2001, the petitioner proceeded to the penalty phase (*see* Docket Entry No. 106). On May 11, 2001, at the conclusion of that phase of the proceedings, the jury sentenced the petitioner to death at each of the five counts of first-degree murder (TT, 3127). Sentencing on the

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[2] Numbers in parentheses preceded by the letters "TT" refer to the pages of the petitioner's jury trial transcript, dated April 27-May 9, 2001 (*see* Docket Entries Nos. 102-06).

non-capital offenses, as well as the formal imposition of the death sentences, was deferred pending the preparation of a pre-sentence report (TT, 3132).

On September 6, 2001, Judge Manning formally imposed the five sentences of death (*see* Docket Entry No. 87 *and* Part III, Docket Entry No. 4). In addition, the court imposed a total term of imprisonment of one-hundred-and-twelve-and-a-half (112½) to two-hundred-and-twenty-five (225) years at the non-homicide counts, including a twenty (20) to forty (40) year sentence for the attempted murder of Sandip Patel, who, incidentally, was paralyzed from the neck down as a result of this incident and ultimately died on February 3, 2007 at age 32 of complications from pneumonia (*see* Docket Entry No. 96).

Post-sentence motions were denied in this

matter on December 29, 2005 (Docket Entry No. 96). On February 28, 2006, following the trial court's granting of the petitioner's Motion for Leave to File Notice of Appeal Nunc Pro Tunc, the petitioner filed a Notice of Appeal to the Supreme Court of Pennsylvania (Docket Entry No. 100). The petitioner's appeal, docketed at No. 513 Capital Appeal Docket, raised sixteen issues. Following the submission of the Commonwealth's brief on September 14, 2007 and oral argument on March 5, 2008, the Supreme Court – on November 20, 2008 – affirmed the convictions and judgments of sentence of death, as well as the other judgments of sentence. (*See* Appendix A of Petition for a Writ of Certiorari). On February 24, 2009, the Supreme Court denied the petitioner's Application for Reargument. (*See* Appendix C of Petition for a Writ of Certiorari).

B. Factual History

The factual history underlying the petitioner's convictions has been set forth in great detail by the Supreme Court of Pennsylvania in *Commonwealth v. Baumhammers*, 960 A.2d 59, 69-71 (Pa. 2008) (*see also* pages 6-12 of Appendix A of Petition for Writ of Certiorari).

REASONS FOR DENYING THE WRIT

I. DESPITE THE PETITIONER'S ASSERTION TO THE CONTRARY, THERE WERE NO REFERENCES MADE AT TRIAL THAT PLACED HIS FUTURE DANGEROUSNESS AT ISSUE SUCH THAT HE WAS ENTITLED TO AN INSTRUCTION PURSUANT TO *SIMMONS V. SOUTH CAROLINA* INFORMING THE JURY THAT HE WOULD NOT BE ELIGIBLE FOR PAROLE IF GIVEN A LIFE SENTENCE. MOREOVER, THE PETITIONER NEVER EVEN REQUESTED THAT A *SIMMONS* INSTRUCTION BE GIVEN, AND THE SUPREME COURT OF PENNSYLVANIA CONCLUDED THAT THE PETITIONER WAS NOT ENTITLED TO RELIEF ON THE BASIS OF THIS FAILURE ALONE. THUS, BECAUSE NO IMPORTANT QUESTION OF FEDERAL LAW WAS DECIDED BY THE SUPREME COURT, THE PETITIONER HAS NO BASIS FOR A PETITION FOR WRIT OF CERTIORARI.

Richard S. Baumhammers, in his Petition for a Writ of Certiorari, contends that his due process rights were violated by the trial court's failure to

instruct the jury during the sentencing phase of his capital proceeding that a defendant convicted of first-degree murder in Pennsylvania cannot be released on parole. It is clear that "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." U.S.Sup.Ct. Rule 10, 28 U.S.C.A. The Commonwealth of Pennsylvania respectfully submits that there are no compelling reasons here.

In determining whether a petition for a writ of certiorari will be granted, this Honorable Court considers situations in which "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or a United States court of appeals," or in which "a state court...has decided an

important question of federal law that has not been, but should be settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." U.S.Sup.Ct. Rule 10(b) and (c), 28 U.S.C.A. The petitioner claims here that the Supreme Court of Pennsylvania has failed to follow the directives of this Honorable Court's decisions in *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994) and *Kelly v. South Carolina*, 534 U.S. 246, 122 S.Ct. 726, 151 L.Ed.2d 670 (2002), in that, despite the fact that evidence of the petitioner's future dangerousness was presented during his trial, the jury was still not given an instruction regarding parole ineligibility. The Commonwealth – and the Supreme Court of Pennsylvania – do not agree that the petitioner's future dangerousness was raised at trial, but, before

addressing the merits of the petitioner's claim, it should first be pointed out that he never specifically requested that such an instruction be given to the jury.

In *Simmons*, a plurality decision, the issue was whether the due process clause of the Fourteenth Amendment was violated by the refusal of the trial court to instruct the jury in the penalty phase of a capital case that, under state law, the defendant was ineligible for parole. 512 U.S. at 156. There, the defendant, believing that there was a reasonable likelihood that the jurors would vote for death simply because of their mistaken belief that he would eventually be released on parole, asked the trial judge to give an instruction clarifying the precise definition of "life imprisonment." *Id.* at 158-59. The prosecution opposed the proposed

instruction, urging the court not to charge the jury at all regarding parole; the trial court sided with the prosecution and refused the defendant's requested instruction. *Id.* at 159-60. This Honorable Court ultimately concluded that the refusal to give the instruction was error, holding that "where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole eligible." *Id.* at 156.

In the wake of that decision, the Pennsylvania Supreme Court has made clear that the so-called *Simmons* instruction is mandated only if two events occur: (1) the prosecution must place the defendant's future dangerousness at issue; and (2) the defendant must have requested that the trial court issue the

instruction. *Commonwealth v. Carson*, 913 A.2d 220, 273 (Pa. 2006); *Commonwealth v. Dougherty*, 860 A.2d 31, 37 (Pa. 2004), *cert. denied*, 546 U.S. 835, 126 S.Ct. 63, 163 L.Ed.2d 89 (2005). In the instant case, the petitioner never asked the trial court to provide an instruction in accordance with *Simmons*; thus, the petitioner's claim was clearly waived. *See Dougherty*, 860 A.2d at 37-38. The Supreme Court here agreed, ruling that because the petitioner did not request a *Simmons* charge, he was not entitled to any relief on his due process claim for that reason alone. *See Commonwealth v. Baumhammers*, 960 A.2d 59, 92 (Pa. 2008). Because the instant issue was not preserved for appeal by the petitioner, the Supreme Court's proper dismissal of the claim on the basis of waiver does not involve an important federal question, nor does it conflict with any relevant

decisions of this Honorable Court. Accordingly, the petitioner's writ should not be granted. *See Kelly*, *supra*, 534 U.S. at 249-50 (defense counsel, relying on *Simmons*, twice requested that the trial court instruct the jurors that if the defendant received a sentence of life imprisonment, he would not be eligible for parole). *See also Commonwealth v. Moore*, 937 A.2d 1062, 1074 (Pa. 2007), *cert. denied*, ___ U.S. ___, 129 S.Ct. 452, 172 L.Ed.2d 326 (2008) (defendant's challenge that *Simmons* instruction should have been given is waived because defendant did not request such an instruction at trial).

The Commonwealth would add that, despite the petitioner's contention to the contrary, his future dangerousness was not raised during trial. In *Simmons*, the prosecution, in its closing argument, expressly stated that the future dangerousness of

the defendant, who had beaten an elderly woman to death in her home, was a factor for the jury to consider when fixing the appropriate punishment. 512 U.S. at 156-57. Specifically, the prosecution maintained that a verdict for death would be "a response of society to someone who is a threat. Your verdict will be an act of self-defense." *Id.* at 157. As noted above, because the defendant's future dangerousness was put at issue by the prosecution, this Court ruled that the defendant was entitled to inform the jury of his parole ineligibility. *Id.* at 171.

Similarly, in *Kelly*, the prosecution presented evidence at the capital sentencing proceeding that while in prison following the murder for which he was convicted, the defendant made a shank and had taken part in an escape attempt, even to the point of planning to draw a female guard into his cell where

he would hold her hostage. 534 U.S. at 248. During closing argument, the prosecutor told the jurors that the defendant "doesn't have any mental illness. He's intelligent...He's quick witted. Doesn't that make somebody a little more dangerous—." *Id.* at 250. Defense counsel interrupted and made an objection, presumably, according to this Court, based on the prosecution having raised the defendant's future dangerousness. *Id.* The prosecutor later continued: "[M]urderers will be murderers." *Id.* Prior to closing argument, the trial court had refused the defense's request to give the jury a *Simmons* instruction on the grounds that the prosecution's evidence went to the defendant's character, not to his future dangerousness, *id.* at 249, and the court again refused to do so following closing arguments, despite defense counsel's renewed request. *Id.* at 250. This

Court found the trial court to have erred, noting that evidence of violent behavior in prison raises a strong implication of future dangerousness. *Id.* at 253. Furthermore, the *Kelly* Court stated that the prosecutor's closing argument to the jury, as it did in *Simmons*, implied that the defendant would, in fact, be let out of prison eventually if the jury did not return a sentence of death. *Id.* at 255. Thus, the jury, like the one in *Simmons*, had been invited by the prosecutor to infer that the defendant was a violent predator who posed a continuing threat to the community. *Id.* at 256.

By contrast, in the instant case, the prosecution made no such references to a continuing threat posed by the petitioner. During the penalty phase of the proceeding, prior to all testimony, defense counsel sought to present an affidavit from

the Secretary of the Pennsylvania Board of Pardons indicating that in the previous 23 years, only one person sentenced to life imprisonment had his or her sentence commuted or had a pardon granted for a first-degree murder conviction (TT, 2761-65).[3] The prosecutor objected, noting that such evidence was not admissible unless and until the Commonwealth raised the future dangerousness of the defendant, and he informed the court that the defendant's future dangerousness "has not been in evidence nor will it be placed in evidence in this phase of the trial" (TT, 2765). The trial court stated that it believed that the law was clear that this type of evidence was

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[3] As the Supreme Court pointed out, "a request to introduce such evidence is not the equivalent of asking the court to provide a specific instruction to the jury pursuant to *Simmons*." *See Baumhammers*, 960 A.2d at 92.

not admissible until the prosecution raised the issue of future dangerousness, but he took the matter under advisement (TT, 2766). After the conclusion of all other sentencing testimony, defense counsel again asked the court if he could introduce into evidence the letter from the Secretary of the Board of Pardons (TT, 3073). The prosecutor again pointed out that the Commonwealth had not raised the issue of the defendant's future dangerousness (TT, 3073). The trial court stated that he agreed with the prosecutor that "there is no indication or evidence on the record" of such future dangerousness, and, therefore, because the affidavit that the defense sought to admit was not relevant, the Commonwealth's objection to it was sustained (TT, 3075-76).

The petitioner does not attempt to suggest

here that the prosecutor, through his argument to the jury, put at issue the petitioner's future dangerousness in the manner that the prosecutors did in *Simmons* and *Kelly*. Rather, the petitioner contends that his future dangerousness was placed before the jury in other ways; namely, through the Commonwealth's psychiatric expert, Dr. Michael Welner, who "suggested to the jury that Baumhammers would continue to commit crimes in the future," and also through the evidence of the five murders that the petitioner committed as well as through the numerous psychiatrists who testified about the likely reemergence of his psychotic behavior without a daily regimen of medication (*see* Petition for Writ of Certiorari, at pp. 9-10). But as was set forth above, in both *Simmons* and *Kelly* there was express comment by the prosecutor

implying that the defendant was dangerous and would be a threat to the community after eventually being let out of prison unless the jury returned a sentence of death. Furthermore, in ruling that the defendant was allowed the to bring his parole ineligibility to the jury's attention, this Court in *Simmons* gave as its reason the fact that the prosecution was "rest[ing] its case for imposing the death penalty at least in part on the premise that the defendant will be dangerous in the future." 512 U.S. at 168-69. In ruling the same way, the *Kelly* Court said that "the evidence **and argument**" presented by the prosecution were at odds with the view that the defendant's future dangerousness was not an issue in the case. 534 U.S. at 253 (emphasis added). Thus, it seems clear from the language of both of these decisions that in order for a defendant's

future dangerousness to be at issue, the prosecution needs to at least imply to the jurors through argument that they should return a sentence of death because of the defendant's continuing threat to society. Because the prosecutor in the instant case unquestionably did not raise the issue of future dangerousness through argument to the jury – a fact that the petitioner concedes, by the way, *see Baumhammers*, 960 A.2d at 91 – the petitioner cannot contend that the Supreme Court's decision to deny his claim on the grounds that his future dangerousness was not placed at issue is in conflict with the relevant decisions of this Court. For this additional reason, separate and apart from the fact that the issue was not properly preserved in the trial court, the petitioner's writ should not be granted. *See also Commonwealth v. Trivigno*, 750 A.2d 243 (Pa.

2000) (trial court erred in refusing to give *Simmons* instruction where prosecutor, in penalty-phase closing argument, specifically told the jury that the defendant's past crimes pointed toward the future).

Lastly with regard to the petitioner's due process claim, even if – as the petitioner suggests – a defendant's future dangerousness can be placed at issue solely through the evidence admitted at trial, the evidence cited by the petitioner here does not suffice. As set forth in the preceding paragraph, the petitioner contends that the prosecution's expert, Dr. Welner, indicated to the jury that he would commit crimes in the future; as support for this claim, the petitioner cites to one lone page of trial transcript – page 2029. On that page, Dr. Welner merely states that a possible diagnosis of the petitioner was that he suffered from antisocial personality disorder, "a

personality disorder that is characteristic of a pattern of rule breaking...and lying across the life cycle in a variety of different settings." The Commonwealth does not see how Dr. Welner's conclusion that the mental delusions from which the petitioner suffers make him likely to lie and break rules is evidence of future dangerousness or the propensity for violence. Similarly, evidence from the "myriad psychiatrists" – the petitioner fails to mention that all of these witnesses, except for Dr. Welner, were called by the defense – who testified about the petitioner's chronic mental illness, as well as his feelings of racial hatred, is certainly not the equivalent of the evidence presented in a case such as *Kelly*, where it was established that the defendant, while awaiting trial, made a shank in prison that he planned to use to take a female guard

hostage. As the Honorable Jeffrey A. Manning stated in his opinion following the denial of the petitioner's post-sentence motions, the petitioner's "reliance on *Kelly*...is misplaced because that case involved evidence of specific criminal acts committed by the defendant after he was incarcerated...There was no evidence remotely similar to this introduced in this matter. The [petitioner] simply argues that the severity of...his offenses and of his mental illness would naturally raise in the minds of the jurors a concern that he would be dangerous in the future. That is not enough, however, under the current state of [the] law, to require that the jury be instructed that life imprisonment precludes the possibility of parole" (*see* Appendix B of Petition for Writ of Certiorari, at p. 131). The Commonwealth agrees with this assessment. Neither *Kelly* nor *Simmons*

offers the petitioner any grounds for relief. Accordingly, his Petition for Writ of Certiorari should be denied.

In addition to his due process claim, the petitioner contends that the failure to give a *Simmons* instruction also violates the Eighth Amendment's "need for heightened reliability in capital cases" (*see* Petition for Writ of Certiorari, at p. 17). As support for his position, the petitioner quotes Justice Souter's concurring opinion in *Simmons*, in which he stated that whenever there is a reasonable likelihood that a juror will misunderstand a sentencing term, "a defendant may demand instruction on its meaning, and a death sentence following the refusal of such a request should be vacated..." 512 U.S. at 172-73 (*see* Petition for Writ of Certiorari, at p. 18). As established

earlier in this argument, the petitioner did not demand an instruction on the meaning of life imprisonment, nor did the trial court refuse such a request. Thus, on that basis alone, the petitioner's claim fails. Moreover, the petitioner's contention that even if his future dangerousness was never placed at issue, a *Simmons* instruction was nevertheless required under the Eighth Amendment is not supported by the binding precedent of this Court (or, for that matter, any other Court). Accordingly, the writ should not be granted on this basis either.

II. THE PETITIONER NEVER MADE A SPECIFIC OBJECTION TO ANY OF THE VICTIM IMPACT STATEMENTS PRESENTED DURING THE PENALTY PHASE OF HIS TRIAL, AND, AS A RESULT, THE SUPREME COURT OF PENNSYLVANIA RULED THAT THE PETITIONER'S CLAIM THAT THE STATEMENTS WERE UNDULY PREJUDICIAL WAS WAIVED. THUS, BECAUSE NO IMPORTANT QUESTION OF FEDERAL LAW WAS DECIDED BY THE SUPREME COURT, THE PETITIONER HAS NO BASIS FOR A PETITION FOR WRIT OF CERTIORARI. IT SHOULD ALSO BE ADDED THAT THE VICTIM IMPACT STATEMENTS ADMITTED IN THIS CASE DID NOT RUN AFOUL OF THIS COURT'S DECISION IN *PAYNE V. TENNESSEE*.

The petitioner's next claim is that the victim impact statements presented during the penalty phase violated his due process rights in that the testimony was unduly prejudicial. While acknowledging that of the 37 states with the death penalty, all have statutes permitting some form of

victim impact evidence at capital sentencing proceedings, and while also conceding that victim impact evidence is at least permissible under this Honorable Court's decision in *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), the petitioner claims that the evidence presented in his case "far exceeded" that which is proper (*see* Petition for Writ of Certiorari, at pp. 22-23). The Commonwealth wholeheartedly disagrees but, as was the case with the preceding issue, must first submit that the claim was never preserved for appeal.

During the penalty phase, defense counsel presented a motion in limine in which he asked the trial court to disallow any victim impact statements at all on the grounds that such statements were unconstitutional because they did not apply to any of

the statutory aggravating factors (*see* TT, 2735-37). The trial court, noting that this Court had approved the admission of victim impact statements in *Payne*, allowed the Commonwealth to present victim impact testimony (*see* TT, 2758).[4] Defense counsel then told the court that he wanted copies of statements from all of the potential Commonwealth witnesses in case he wanted to voice an objection prior to their taking the stand (TT, 2767). The trial court informed defense counsel that he could ask the prosecutor for an offer of proof prior to each witness being called and the defense could raise an objection at sidebar at that time if it so chose; defense counsel thereupon

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[4] The introduction of victim impact testimony in the penalty phase of a capital case is also authorized by statute in Pennsylvania. *See* 42 Pa. C.S. §9711(a)(2).

acknowledged that he understood that any objections were to be raised on a witness-by-witness basis (TT, 2768). The prosecutor assured defense counsel that he was only going to ask the witnesses to identify their relationship to the victim, provide a brief idea of who the victim was, and describe what impact the victim's death had on them or the victim's family; he stated that he would not be asking their personal opinions of the defendant or their beliefs on what the appropriate penalty should be (TT, 2769).

At the penalty phase, the Commonwealth proceeded to present the victim impact testimony of twelve witnesses, which included the wife of murder victim Thoa Quoc ("Tony") Phem; the father and wife of murder victim Ji-Ye ("Jerry") Sun; two daughters and a cousin of murder victim Anita Gordon; the mother, girlfriend, aunt and cousin of murder victim

Garry Lee; and two countrymen of murder victim Anil Thakur, who were familiar with the family whom Thakur had left behind in India (*see* TT, 2820-36). The petitioner contends that certain portions of this testimony were "extensive and emotionally overwhelming" and that the testimony "injected emotional considerations that had no relevant purpose in the proceedings" (*see* Petition for Writ of Certiorari, at pp. 23-25). It is clear from the testimony of each of these witnesses, however, that the defense made no objection to any of their statements.[5] *See Baumhammers*, *supra*, 960 A.2d at

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[5] The only objection raised by the defense at this time was to a photograph that the Commonwealth attempted to introduce during the testimony of Jerry Sun's father; the trial court sustained the objection and did not allow the jury to see the photograph (TT. 2876-77).

93. Thus, because the petitioner made no specific, timely objection in the trial court to the statements that he wished to challenge on appeal, the Supreme Court found the issue to be waived, citing Pennsylvania Rule of Appellate Procedure 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal."). *Baumhammers*, at 93. Given that the issue was not properly preserved for appeal, the Supreme Court's dismissal of the claim on this basis does not involve an important federal question, and, accordingly, the petitioner's writ should not be granted.

In any event, even if waiver were put aside, the petitioner's claim would have no merit. In *Payne*, this Court held that "[a] State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is

relevant to the jury's decision as to whether or not the death penalty should be imposed." 501 U.S. at 827. In Pennsylvania, in addition to the legislature codifying this language at 42 Pa. C.S. §9711(a)(2), the Supreme Court "set out clear guidelines for victim impact statements in death cases[,] [holding] that Pennsylvania jurisprudence favors the introduction of all relevant evidence during a capital sentencing proceeding and that our sentencing scheme does not limit this evidence in the penalty phase to only the information necessary to establish aggravating and mitigating circumstances." *Commonwealth v. Eichinger*, 915 A.2d 1122, 1139 (Pa. 2007), *cert. denied*, __ U.S. __, 128 S.Ct. 211, 169 L.Ed.2d 158 (2007), citing *Commonwealth v. Means*, 773 A.2d 143, 153 (Pa. 2001). The Court continued: "Victim impact testimony is permissible when the

Commonwealth establishes that the victim's death had an impact on the victim's family as opposed to presenting mere generalizations of the effect of the death on the community at large. Once this threshold has been met, the trial court has discretion over the testimony admitted." *Eichinger*, at 1139-40. *See also Commonwealth v. Williams*, 854 A.2d 440, 446 (Pa. 2004), *cert. denied*, 546 U.S. 829, 126 S.Ct. 45, 163 L.Ed.2d 78 (2005).

In the instant matter, the petitioner shot and killed five people in a spree in which he targeted racial and ethnic minorities, and the petitioner cannot argue here – and, in fact, does not argue here – that those deaths did not have a specific impact on each victim's family. Speaking in regard to that impact, Anita Gordon's daughter testified during the penalty phase, that her father is disturbed whenever

he sees his wife's picture and that her grandmother had to be moved to a nursing home because Mrs. Gordon is no longer around to help her (TT, 2867). Anil Thakur's countrymen testified that Thakur's death had a financial effect on his family back in India (TT, 2853-554). Garry Lee's girlfriend talked of how she does not want to leave the house sometimes because of Lee's death and how his death also negatively affected the moods of his mother and sister (TT, 2886). Jerry Sun's wife testified that at the time of her husband's death, she could not eat or sleep (TT, 2884). Sun's father testified that, as a result of crying over Sun's death, his wife had to undergo surgery on her right eye to keep her from losing her sight (TT, 2876). Tony Pham's wife testified that their six-year-old son asks her how his father died and whether he will be coming back (TT,

2838). The Pennsylvania Supreme Court had previously held that testimony such as this – "personal account[s] which demonstrated the devastating impact the murders had" on a victim's surviving family members – was indeed appropriate victim impact evidence in capital sentencing proceedings. *Id.* at 1140. The *Baumhammers* Court ruled that the victim impact testimony challenged by the petitioner here consisted merely of this type of personal account describing the impact the murders had on the surviving family and that the number of witnesses called to testify was not disproportionate to the large number of victims; thus, there was no error in admitting the evidence, even if the petitioner had not waived the issue. 960 A.2d at 94. The Commonwealth would respectfully submit that this ruling was proper, given this Court's conclusion

in *Payne* that "for the jury to assess meaningfully the defendant's moral culpability and blameworthiness," a State may legitimately decide that the jury "should have before it at the sentencing phase evidence of the specific harm caused by the defendant." 501 U.S. at 825. For this additional reason, the petitioner's writ should not be granted.

III. THE LAW DOES NOT PRECLUDE THE IMPOSITION OF THE DEATH PENALTY ON INDIVIDUALS SUCH AS THE PETITIONER, WHO HAS BEEN DIAGNOSED WITH DELUSIONAL DISORDERS.

The petitioner's final claim is that this Honorable Court's decision in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), which held that the execution of mentally retarded criminals was cruel and unusual punishment prohibited by the Eighth Amendment, should be extended to persons with mental illness. The petitioner states that *Atkins* stands for the proposition that "imposing a death sentence on mentally retarded individuals violates the evolving standards of decency embodied in the Eighth Amendment's Cruel and Unusual Punishment clause," and he maintains that "[t]he Supreme Court of Pennsylvania has ruled to the contrary" (*see*

Petition for Writ of Certiorari, at p. 28). This latter assertion is simply incorrect. In *Commonwealth v. Faulkner*, 595 A.2d 28, 38 (Pa. 1991), *cert. denied*, 503 U.S. 989, 112 S.Ct. 1680, 118 L.Ed.2d 397 (1992), the Supreme Court ruled that the Eighth Amendment is not violated by the imposition of the death penalty even in situations where the jury found as a mitigating factor that the defendant suffered from "a degree of mental illness." *See also Commonwealth v. Fahy*, 516 A.2d 689, 698-99 (Pa. 1986) (a finding of substantial impairment under 42 Pa. C.S. § 9711(e)(3), which deals with the capacity of a defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of the law, does not bar a penalty of death imposed by a jury). Neither *Faulkner* nor *Fahy* involved a defendant who was mentally retarded, and,

therefore, the petitioner has wholly mischaracterized the prior decisions of the Supreme Court of Pennsylvania when he suggests that that Court has ruled contrary to this Court's decision in *Atkins*.

In any event, the petitioner, citing *Atkins*, sets forth the clinical definition of mental retardation, which he indicates is characterized by "significantly subaverage intellectual functioning"; he adds that the *Atkins* Court further stated that an IQ of 75 is "typically considered the cutoff IQ score for the intellectual functioning prong of the mental retardation definition..." (*see* Petition for Writ of Certiorari, at pp. 28-29). The Commonwealth does not understand why the petitioner dedicates nearly two full pages of his seven-page argument to the definition of mental retardation when it was established at trial that he was, in fact, a law school

graduate (*see* TT, 2903-04). The petitioner clearly does not suffer from mental retardation, a fact that he later goes on to concede in his petition (*see* Petition for Writ of Certiorari, at p. 30).

Moreover, as the primary support for his claim that the death penalty should not be imposed on individuals with mental illness, the petitioner relies on "non-majority opinions" in which judges "have expressed doubt" as to the appropriateness of executing persons who have some form of mental disorder (*see* Petition for Writ of Certiorari, at p. 31). The Commonwealth acknowledges that the psychiatric witnesses in this case, including Commonwealth expert Dr. Welner, testified that the petitioner suffered from delusional disorders (*see* TT,

1935).[6] But the petitioner has cited no law that indicates that an individual with this condition cannot be subjected to the death penalty (nor, for that matter, has the petitioner set forth exactly what this condition entails). *Atkins* offers him no help, as that case dealt with a defendant with an IQ of 59, *see* 536 U.S. at 309, whereas the petitioner, as alluded to above, was a former practicing attorney. The Commonwealth agrees with the Supreme Court of Pennsylvania that the petitioner has failed to advance a compelling argument that the evolving standards of decency preclude an individual such as

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[6] Dr. Welner indicated that, by definition, delusional disorder – while marked by a person's irrational ideas – does not necessarily compromise that person's ability to distinguish right from wrong or his ability to know the nature and quality of his acts (TT. 1936-37).

himself from being subject to the death penalty. *See Baumhammers*, 960 A.2d at 97. Thus, his writ should not be granted.

CONCLUSION

For the foregoing reasons, the Commonwealth of Pennsylvania respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari to the Supreme Court of Pennsylvania.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that I am this day serving three (3) copies of the within Respondent's Brief In Opposition To Petition For A Writ Of Certiorari To The Supreme Court of Pennsylvania in the manner indicated below, which service satisfies the requirements of United States Supreme Court Rule 29:

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Dated: July 31, 2009

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